Petition

81-1526

No. ____

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MARC FELDMAN

Cross-Petitioner,

v.

THE DISTRICT OF COLUMBIA
COURT OF APPEALS, *et al.*

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT M. SUSSMAN
JAMES A. TOUPIN

COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202) 662-6000

Attorneys for Cross-Petitioner

February 16, 1982

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QUESTIONS PRESENTED

1. Are the bar admission criteria established by the District of Columbia Court of Appeals exempt from scrutiny under the federal antitrust laws where the Court is not a sovereign but a subordinate governmental body created by act of Congress and no clearly articulated and affirmatively expressed Congressional policy exists regarding the standards for admission to the District of Columbia bar?

2. Even if the D.C. Court of Appeals is an agent of the sovereign, is there any basis for concluding that the Court's actions relating to bar admission are immune from scrutiny under the antitrust laws where the Court has abdicated to the American Bar Association, a private entity, its authority to establish eligibility criteria for bar admission?

PARTIES TO THE PROCEEDING SOUGHT TO BE REVIEWED

This cross-petition seeks review of a decision of the U.S. Court of Appeals for the D.C. Circuit in the case of Feldman v. Gardner [D.C. Cir. No. 78-2235]. The parties to that appeal were:

Plaintiff

Marc Feldman

Defendants

William C. Gardner
Chairman, Committee on Admissions
District of Columbia Court of Appeals
Anthony Nigro
Secretary, Committee on Admissions
District of Columbia Court of Appeals
Committee on Admissions
District of Columbia Court of Appeals
District of Columbia Court of Appeals
The Honorable Theodore R. Newman, Jr.,
Chief Judge, District of Columbia
Court of Appeals

The petition which this cross-petition accompanies also seeks review of *Hickey* v. *District of Columbia Court of Appeals* [D.C. Cir. No. 79-1233], which the court below treated as a companion case to *Feldman* v. *Gardner* but did not consolidate with that case. The parties in *Hickey* who are not also parties in *Feldman* are as follows:

Plaintiff

Edward J. Hickey, Jr.

Defendants

Catherine B. Kelly
John W. Kern, III
George R. Gallagher
Frank Q. Nebeker
Walter Yeagley
Stanley S. Harris
Julia C. Mack
John M. Ferren

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Marc Feldman, respondent in No. 81-1335, respectfully cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals of which review is sought is reproduced in the Appendix to the Petition for Certiorari filed on behalf of the District of Columbia Court of Appeals ("Pet. App.") at 1a-60a. The two decisions of the district court that were reviewed by the U.S. Court of Appeals appear at Pet. App. 61a-73a.

STATEMENT OF JURISDICTION

The panel of the U.S. Court of Appeals for the District of Columbia Circuit filed its Opinion in this case on July 23, 1981. The U.S. Court of Appeals denied the petitions for reconsideration and suggestions for rehearing *en banc* on October 27, 1981.

Counsel for Marc Feldman received the petition for certiorari filed in this case on January 15, 1982. In accordance with Rule 19.5 of the Rules of the Supreme Court, this cross-petition is filed not more than 30 days after receipt of the petition for certiorari. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2101(c) (1976).

STATUTES INVOLVED

The principal statute involved in this case is D.C. Code Ann. § 11-102, a provision of the Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473 *et seq.* (1970). It states as follows:

> "The District of Columbia Court of Appeals shall make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion." D.C. Code Ann. § 11-2501(a) (1981).

The case also involves Rule 46 I(b)(3) of the General Rules of the D.C. Court of Appeals, which provides:

> "An applicant who has graduated from a law school that at the time of graduation was approved by the American Bar Association or who shall be eligible to be graduated from an approved law school within 60 days of the date of the examination will be permitted to take the bar examination. Under no circumstances shall an applicant be admitted to the bar without having first submitted to the Secretary to the Committee a certificate verifying that he has graduated from an approved law school."

STATEMENT OF THE CASE

The background and history of this case are described fully in Mr. Feldman's brief in opposition to the petition for certiorari filed in No. 81-1335. The facts which are relevant to this cross-petition are presented briefly below.

Marc Feldman obtained his legal education by pursuing a program of law office study authorized by the Virginia Code. After completing his apprenticeship, Mr. Feldman took and passed the Virginia bar examination and was admitted to the Virginia Bar. He then took and passed the Maryland bar examination, subsequently becoming a member of the Maryland Bar as well. Pet. App. 8a-9a.

Mr. Feldman thereafter became associated with an attorney practicing in the District of Columbia and applied for admission to the District of Columbia Bar. On May 11, 1977, however, the Committee on Admissions advised him that his application for admission had been rejected on the basis of Rule 46 I of the D.C. Court of Appeals. Pet. App. 10a. This Rule requires applicants for bar admission to be graduates of a law school accredited by the American Bar Association ("ABA").

On June 13, 1977, Mr. Feldman petitioned the D.C. Court of Appeals for a waiver of Rule 46 I that would allow him either to be admitted to the Bar directly or to take the bar examination. After consulting with the ABA (Pet. App. 39a, n. 166), the D.C. Court of Appeals on March 30, 1978, issued an order stating that "the petition of Marc Feldman to waive the provisions of Rule 46" had been considered and denied. Pet. App. 76a. Accompanying the Court's order was a letter, dated March 29, 1978, from Chief Judge Newman to respondent's counsel. That letter acknowledged that Mr. Feldman "has had an exceptional opportunity for training and is a personable, impressive and outstanding individual." However, the letter then stated

that "the court has concluded that its rules should not be waived." Pet. App. 11a.

On May 26, 1978, Mr. Feldman filed a complaint in the United States District Court for the District of Columbia, seeking a judicial determination that Rule 46 I was invalid both on its face and as applied to him. The complaint invoked both the Fifth Amendment to the United States Constitution and the federal antitrust laws. By creating an irrebutable presumption that only graduates of an ABA-accredited law school are qualified to practice law, the complaint alleged, defendants had unreasonably restricted entry to the legal profession. As a result, Mr. Feldman asserted, defendants had entered into a combination in restraint of trade, thereby violating Section 1 of the Sherman Act, and had sought to create a monopoly over the practice of law, thereby violating Section 2 of that Act. [1]

On October 24, 1978, District Judge June Green entered an order dismissing the complaint on the ground that the district court lacked subject-matter jurisdiction. Pet. App. 6la-66a. On July 23, 1981, the United States Court of Appeals for the D.C. Circuit reversed the district court's decision. The D.C. Circuit held that the D.C. Court of Appeals' order denying respondent's petition was an exercise of that Court's administrative power over bar admissions and, hence, that the district court had jurisdiction to entertain a challenge to the constitutionality of the eligibility requirements contained in the Court's rules. Pet. App. 27a-49a.

The D.C. Circuit also held, however, that Mr. Feldman's antitrust claim should have been dismissed as frivolous. In reaching this conclusion, the court of appeals acknowledged that the District of Columbia and its government do not have the status of states and, hence, are not exempt from the antitrust

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[1] Mr. Feldman's complaint is reprinted on pages 3-34 of the Joint Appendix ("JA") filed in the court of appeals.

laws by virtue of *Parker* v. *Brown*, 317 U.S. 341 (1943). Pet. App. 22a. It held, nevertheless, that the D.C. Court of Appeals may not be sued for violations of the federal antitrust laws because Congress authorized it "to make such rules as it deems proper respecting the . . . admission of persons to membership in its bar . . ." D.C. Code Ann. § 11-2501(a). According to the court of appeals, this grant of power carried with it an implied immunity from antitrust scrutiny in setting and enforcing criteria for bar admission. App. 25a-26a.

REASONS FOR ALLOWING THE WRIT

In two basic respects, the opinion of the court below is in conflict with prior decisions of this Court which define when the actions of a governmental body are immune from scrutiny under the antitrust laws.

First, as a quasi-independent governmental entity created by Congress, the District of Columbia lacks the sovereignty possessed by the federal government and the states. Accordingly, the actions of the D.C. Court of Appeals are not automatically immune from the antitrust laws; rather, any immunity the Court enjoys must be implied from acts of Congress. Recently, this Court held that municipalities are exempt from antitrust liability only where their actions are authorized by a "clearly articulated and affirmatively expressed state policy." *Community Communications Co.* v. *City of Boulder*, No. 80-1350 (Jan. 13, 1982). The same principle should be applicable to federally-created entities like the District of Columbia. Under this approach, the D.C. Court of Appeals could not qualify for antitrust immunity because Congress has never adopted a "clearly articulated and affirmatively expressed" policy regarding admission to the District of Columbia bar.

Second, the Court's decisions demonstrate that, even where antitrust claims are directed against an agent of the sovereign, no antitrust immunity is available if the governmental body in

question has merely acquiesced in the results of private decision-making without any independent effort to define or apply governmental policy. This is precisely what happened here. The D.C. Court of Appeals has abdicated its responsibility to define admission standards to a private entity, the ABA, which makes accredidation decisions without the review or supervision of the Court itself. The antitrust laws would be thwarted if such official acquiescence in private conduct could serve to insulate that conduct from meaningful antitrust review.

I. The Bar Admission Criteria Established By The D.C. Court Of Appeals Do Not Meet This Court's Standards For Implied Immunity From The Antitrust Laws.

In *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 399 (1978), this Court established a "presumption against repeal [of the antitrust laws] by implication [which] reflects the understanding that the antitrust laws establish overarching and fundamental policies, a principle which argues with equal force against implied exclusions." As the Court emphasized, "[t]wo policies have been held sufficiently weighty to override the presumption against implied exclusions from the coverage of the antitrust laws." *Id.* Those policies are, first, "the threat to the constitutionally protected right of petition" recognized in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (*id.*) and, second, the " 'dual system of government in which, under the Constitution, the states are sovereign . . .' " *Id.* at 400 (quoting Parker v. Brown, 317 U.S. 341, 351).

In *Community Communications Co.* v. *City of Boulder*, the Court addressed the circumstances under which local governmental bodies share in the antitrust immunity of the states. The Court first stressed that

> ". . . all sovereign authority 'within the geographical limits of the United States' resides either with

> '*the Government of the United States, or [with] the States of the Union. There exist within the broad domain of sovereignty but these two*. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist, in subordination to one or the other of these.' *United States* v. *Kagama*, 118 U.S. 375, 379 (1886) (emphasis added)."

Slip Op. at 12. The Court then reiterated that, under its prior decisions, " 'municipalities are not themselves sovereign' " and, hence, that any antitrust immunity they enjoyed had to be implied from state legislation defining their responsibilities. Such implied immunity, the Court held, would be available "only to the extent that they acted pursuant to a clearly articulated and affirmatively expressed state policy." Id. at 12-13.

City of Boulder does not directly address the antitrust status of governmental entities, like the District of Columbia, that are created not by the states but by Congress. Nevertheless, the principles adopted by the Court are clearly applicable by analogy. In *City of Boulder*, the Court stressed "Congress' intention to limit the state action exemption" to clear exercises of "state sovereignty." Slip Op. at 12. Congress undoubtedly wanted a comparable doctrine to operate in the federal sphere, and thus intended to exempt federal instrumentalities from antitrust scrutiny only where they are exercising the sovereign powers of the United States.

The governmental organs of the District of Columbia do not possess this status. As the court below recognized, the District of Columbia is a "semi-autonomous governmental unit" created by federal law and, as such, "lack[s] the sovereignty inherent in statehood." Pet. App. 22a-23a. On prior occasions, the D.C. Circuit has held that governmental entities in the District lack the attributes of the federal sovereign and, thus, are immune from the antitrust laws only if Congress has clearly intended to

confer such immunity.[2] Indeed, the provisions of the antitrust laws directly support this conclusion. Those laws provide that antitrust liability may be imposed on "persons,"[3] a term specifically defined "to include corporations or associations existing under or authorized by the laws of . . . the United States . . ."[4] The District of Columbia government falls squarely within this definition.[5]

In view of the "presumption against . . . implied exclusions" from the antitrust laws[6] and the "indispensable role of antitrust policy in the maintenance of a free economy,"[7] it would be irrational to treat governmental entities created by Congress any differently from municipalities created by the states. Thus, the antitrust immunity of the D.C. Court of Appeals should be governed by the principles established in *City of Boulder;* the controlling question should be whether the Court's actions derive from a "clearly articulated and affirmatively expressed" policy of Congress.

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[2] *See* Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), holding that the District of Columbia Armory Board, established by Congress to operate an athletic stadium in the District, was not immune from antitrust liability. Significantly, the D.C. Circuit relied heavily on decisions of this Court which define the circumstances in which a federal regulatory statute will be deemed to confer antitrust immunity on private entities subject to control by federal agencies. 444 F.2d at 942-944.

[3] As the Court noted in City of Lafayette v. Louisiana Power & Light Co.: "The antitrust laws impose liability on . . . a 'person' or 'persons' as defined in those Acts." 435 U.S. at 394-95.

[4] Sherman Act, Section 8, 15 U.S.C. § 7 (1976); Clayton Act, Section 1, 15 U.S.C. § 12 (1976).

[5] In the legislation establishing "home rule" for the District, Congress created a "body-corporate for municipal purposes" to discharge governmental functions in the District of Columbia. Section 101(a) of the Reorganization Plan No. 3 of 1967.

[6] City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 399.

[7] United States v. Philadelphia National Bank, 374 U.S. 321, 348 (1964).

In *City of Boulder*, the Court made it clear that such a policy cannot be inferred merely from a general grant of governmental authority:

> "[P]lainly the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as 'comprehended within the powers *granted*,' since the term, 'granted,' necessarily implies an affirmative addressing of the subject by the State . . . Acceptance of such a proposition - that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances - would wholly eviscerate the concepts of 'clear articulation and affirmative expression that our precedents require."

Slip Op. at 13-14 (emphasis in original).

Here, the only arguable authorization for the conduct challenged by Mr. Feldman is Congress' declaration that the D.C. Court of Appeals should regulate entry to legal practice by promulgating "such rules as it deems proper . . ." D.C. Code Ann. § 11-2501 (1981). This statutory provision is at best an expression of "mere neutrality" respecting the Court of Appeals' criteria for admission to the District bar. It provides no basis for concluding that Congress specifically envisioned and approved any particular set of bar admissions criteria — much less an admissions process which assigned conclusive weight to the accredidation decisions of a private entity like the ABA. Thus, while Congress may have allowed the D.C. Court of Appeals "to do as [it] please[d]" in the area of bar admissions, it clearly cannot "be said to have 'contemplated' the specific

anticompetitive actions" that Mr. Feldman has challenged in this case. [8]

For these reasons, the lower court's holding that the D.C. Court of Appeals is immune from antitrust scrutiny represents a clear departure from *City of Boulder* and other decisions of this Court. The Court should grant certiorari both to clarify the status under the antitrust laws of independent governmental entities created by Congress and to assure that Mr. Feldman's antitrust claims are considered on their merits.

II. Even If The D.C. Court Of Appeals Is Entitled To Antitrust Immunity When Exercising The Powers Of A Sovereign, That Immunity Does Not Apply When The Court Merely Acquiesces In The Decisions Of A Private Entity Like The ABA.

The decisions of this Court also demonstrate that, even when antitrust claims are directed against an agent of the sovereign, antitrust immunity is available only where the conduct chal-

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[8] The lower court expressed concern about holding that the D.C. Court of Appeals "could become exposed to antitrust liability when it exercises" its authority over admission to the bar. Pet. App. 25a-26a. The answer to that concern, however, is the same answer that the Court gave in *City of Boulder* when similar fears were expressed about imposing antitrust liability on municipalities:

> "[T]his argument is simply an attack upon the wisdom of the long-standing congressional commitment to the policy of free markets and open competition embodied in the antitrust laws . . . Moreover, judicial enforcement of Congress' will . . . 'means only that when the State itself has not itself directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws.' "

Slip Op. at 14-15 (citation omitted). It should be stressed that a holding that the D.C. Court of Appeals is not entitled to antitrust immunity is not tantamount to a finding of antitrust liability; that issue would remain to be decided by the lower courts. Moreover, like *City of Boulder* (see Slip Op. at n.20), this case involves merely the availability of injunctive relief; Mr. Feldman has not sought monetary damages from the D.C. Court of Appeals or its judges.

lenged as anticompetitive has received active and affirmative supervision by the sovereign itself. This principle provides an additional reason why the court below erred in according antitrust immunity to the D.C. Court of Appeals.

In *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), the Court was presented with an antitrust challenge to disciplinary rules adopted by the Arizona Supreme Court. While the Court held that the rules were exempt from antitrust scrutiny, its reasoning illustrates why no such exemption should be afforded here. The Court began its analysis by recognizing that the claims were directed against the state because the Arizona Supreme Court was the real party in interest, and that "regulation of the activities of the bar is at the core of the State's power to protect the public." *Id.* at 361. This did not, however, end the Court's inquiry. The Court went on to emphasize that the Arizona Supreme Court was actively supervising the State Bar:

> "Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee [State Bar] acts as the agent of the Court under its continuous supervision . . .
>
> . . . The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior. Moreover, as the instant case shows, *the rules are subject to pointed re-examination by the policy maker* — the Arizona Supreme Court — in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; *we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active*."

Id. at 361-62 (emphasis added).

In *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court again recognized that, for antitrust immunity to attach, the "challenged restraint must be 'one clearly articulated and affirmatively expressed as state

policy' [and] . . . the policy must be 'actively supervised' by the State itself." *Id.* at 105 (citation omitted). The Court held that the first element was met since the legislative policy was forthrightly stated, but then determined that the challenged state action did not "meet the second requirement for *Parker* immunity" because the state had failed to actively supervise the program. Id. at 105. The Court elaborated:

> "The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any pointed reexamination of the program."

Id. at 105-106. The Court distinguished the program challenged in *Parker* v. *Brown, supra* (in which a number of state officials were defendants), on the ground that *Parker* held the Sherman Act inapplicable because of extensive state oversight; as the Court cautioned, "[w]ithout such oversight, the *[Parker]* result could have been different." *Id.* at 104.

Indeed, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) expressly holds that the mere fact that a governmental body possesses the powers of the sovereign will not give rise to antitrust immunity if its actions do not reflect the active supervision of the sovereign itself. In that case, a minimum fee schedule adopted and enforced by the Virginia State Bar was challenged as a violation of the Sherman Act. It was undisputed that the Bar was "a state agency by law" (421 U.S. at 790) and that it had been "acting in its official capacity" in adopting the fee schedule at issue.[9] Nevertheless, no state statute specifically referred to lawyers' fees and the Virginia Supreme Court had never reviewed and approved the fee schedule's adoption. Under these circumstances, the Court held that the State Bar, though exercising its powers as an organ of the sovereign, had

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[9] City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 411 n.41.

"voluntarily joined in what is essentially a private anticompetitive activity" and thereby lost its immunity from antitrust liability. *Id* at 792.

Since *Goldfarb*, the Court has reiterated that, for purposes of antitrust immunity, "not every act of a state agency is that of the State as sovereign." *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. at 410. The wisdom of this rule is self-evident. If antitrust immunity were automatically accorded to all agents of the sovereign, the fact of governmental action would always shield anticompetitive conduct from antitrust scrutiny. Thus, anticompetitive arrangements conceived and implemented by private entities would be beyond antitrust challenge wherever they had received the acquiesence of governmental bodies. [10] It would make no difference whether the governmental body had evaluated and actively supervised these private arrangements or had simply ratified them indiscriminately without an independent inquiry of its own.

These concerns are vividly illustrated by the present case. Rule 46 I of the D.C. Court of Appeals establishes a conclusive presumption that only graduates of a law school accredited by the ABA — a private entity — are eligible to practice law in the District of Columbia. If an applicant for bar admission has not graduated from such a school, he will be summarily rejected without any opportunity to demonstrate the adequacy of his

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[10] In its opinion, the lower court suggested that Mr. Feldman's remedy might be to file suit against the ABA. Pet. App. 26a. However, the equitable relief that Mr. Feldman seeks — admission to the bar — can only be obtained by a court order directed at the Court of Appeals itself. There is no reason why an arm of the sovereign that has acquiesced in the results of private decision-making should be beyond the reach of a court-imposed remedy where it is the sovereign's failure to define and apply government policy that has exposed the plaintiff to injury under the antitrust laws and where the resulting antitrust violation can only be effectively rectified by an order directed against a governmental body.

qualifications to the D.C. Court of Appeals. Yet there is no evidence in the record that the Court has independently evaluated the general accreditation process of the ABA and satisfied itself that this process provides a sound basis for determining eligibility to practice law; indeed, there is no evidence that the Court even knows what the ABA-accreditation criteria are. [11] Under these circumstances, the Court of Appeals has effectively abdicated to the ABA its authority to set standards for bar admission. [12] Thus, the factors determining eligibility to practice law in the District of Columbia have never been "affirmatively expressed" or "actively supervised" by the Court itself, but have been committed to private control.

The antitrust laws would be thwarted if the D.C. Court of Appeals' authority to grant or deny bar admission could be invoked to insulate a private accreditation process from antitrust scrutiny. Accordingly, the Court should grant certiorari to clarify that antitrust immunity is not available where a governmental body has abdicated its statutory functions to a private decision-maker without any effort to define or apply government policy.

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[11] Mr. Feldman sought discovery in the district court to determine the degree to which the D.C. Court of Appeals was familiar with and had specifically approved the accredidation process established by the ABA. JA 40. Defendants resisted Mr. Feldman's discovery request, however, and the issue became moot when the district court dismissed the complaint.

[12] Mr. Feldman does not contend that the ABA accredidation process should play no role in the admissions decisions of the D.C. Court of Appeals. Here, however, the Court has failed to make a reasoned and informed judgment that the ABA's accredidation criteria provide a sound basis for determining eligibility to practice law. Moreover, the Court has so totally deferred to the ABA's accredidation process that it will not even considerthe qualifications and training of an applicant who has not attended an approved law school.

CONCLUSION

The Court should grant Mr. Feldman's cross-petition for a writ of certiorari to review the portion of the lower court's decision upholding the dismissal of Mr. Feldman's antitrust claims as frivolous.

Respectfully submitted,

ROBERT M. SUSSMAN
JAMES A. TOUPIN

COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202) 662-6000

Attorneys for Cross-Petitioner

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Opposition

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BRIEF OF CROSS-RESPONDENTS IN OPPOSITION TO CROSS-PETITIONS FOR CERTIORARI

DANIEL A. REZNECK
CHARLES H. COCHRAN
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Attorneys for Cross-Respondents

Of Counsel:

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

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BRIEF OF CROSS-RESPONDENTS IN OPPOSITION TO CROSS-PETITIONS FOR CERTIORARI

This brief is filed on behalf of the cross-respondents—who include the Judges of the District of Columbia Court of Appeals and the Court itself—in opposition to the cross-petitions for certiorari. The cross-petitions were filed on February 16, 1982, outside of the 90-day period allotted for seeking certiorari. Accordingly, under Rule 20.5 of this Court's Rules, the cross-petitions may not be granted unless our petition for certiorari in No. 81-1335 is also granted.

REASONS FOR DENYING THE CROSS-PETITIONS

The cross-petitions seek review of the unanimous decision of the U.S. Court of Appeals affirming the dismissal of cross-petitioners' antitrust claims. (Unlike the ruling on the issue of jurisdiction over the constitutional claims which our petition for certiorari tenders for review, every judge who heard the issue of jurisdiction over the antitrust claims agreed that jurisdiction was lacking.) The cross-petitioners had alleged that the D.C. Court of Appeals' Rule requiring graduation from or attendance at an ABA approved law school as a prerequisite to admission to the D.C. bar examination violated the Sherman and Clayton antitrust acts. The U.S. Court of Appeals held that the antitrust claims were so obviously without merit and insubstantial as to provide no basis for federal jurisdiction. That holding was based upon the state action doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943), as specifically applied to regulation of the bar in *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), and *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975). As the U.S. Court of Appeals said:

> "We hold that the [D.C.] Court of Appeals—as 'the ultimate body wielding [governmental] power over the practice of law' in the District of Columbia—acts in a sovereign governmental capacity—*as sovereign as an exertion of judicial power can ever be*—when it sets and enforces educational prerequisites for admission to the bar examination. It may be that appellants could have sued ABA, if indeed that organization engages in anti-competitive behavior and thereby inflicts injury upon them. They cannot, however, subject the [D.C.] Court of Appeals to a charge of antitrust violation. We affirm the dismissal of appellants' antitrust claims." App. at 26a (footnotes omitted) (emphasis supplied).

The cross-petitions raise nothing that could possibly provide a basis for overturning, or even reconsidering, this conclusion.

The cross-petitions rely heavily on this Court's recent decision in *Community Communications Co.* v. *City of Boulder,* 50 U.S.L.W. 4144 (Jan. 13, 1982), which counsel obviously have seized upon at the last minute in their continuing, but so far futile, effort to develop a colorable antitrust theory.

On the basis of that case, the cross-petitions make an argument—never before raised—to the effect that the D.C. Court of Appeals is somehow to be considered as a municipality for purposes of the federal antitrust laws. That argument finds no support either in the *City of Boulder* case or in these cases. The simple fact is that the D.C. Court of Appeals is not a municipality, nor is it even analogous to a municipality.

The status of the D.C. Court of Appeals was accurately described as follows in the decision below:

> "[W]hatever the status of the District's legislative and executive branches in the hierarchy of antitrust exemption, the Court of Appeals is plainly a federal instrumentality armed with the supreme judicial power over nonfederal subject matter in the District. . . . The court was established by Congress to head the local judiciary in an indispensable function of government, and was invested with powers virtually identical to those of the highest courts of the states. The Court of Appeals is not a governmental entity simply substituting for private enterprise, nor one seeking refuge merely in the fact that it is a governmental instrumentality.
>
> "Without a doubt, the Court of Appeals has the same compelling interest as a state supreme court in regulating the bar of its jurisdiction. While we would not lightly attribute to Congress a desire to counter the important objectives of the federal antitrust policies, we have great difficulty in imagining an intent to disturb the traditional authority of courts to meet one of their most vital needs—determining who will be admitted to practice before them as court officers. Here Congress issued a clear legislative mandate:

> The District of Columbia Court of Appeals shall make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion.

Responding to the directive of this legislation, the court, by conditioning admission to the bar examination upon educational attainment in an ABA-approved law school, acts no differently than the vast majority of states in the constant effort to assure the public that members of the bar are qualified lawyers. And '[s]ince the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions.' It would fly in the face of congressional intent in conferring this broad and essential regulatory authority upon the court to rule that it could become exposed to antitrust liability when it exercises it." App. at 23a-26a (footnotes omitted).

CONCLUSION

The decision below as to cross-petitioners' antitrust claims is clearly correct. No review of that decision is warranted. The cross-petitions for certiorari, accordingly, should be denied.

Respectfully submitted,

DANIEL A. REZNECK
CHARLES H. COCHRAN
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Attorneys for Cross-Respondents

Of Counsel:

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Cross-Respondents in Opposition to Cross-Petitions for Certiorari were sent by first-class mail, postage prepaid, to each of the following persons on this 17th day of March, 1982:

Robert M. Sussman, Esquire
James A. Toupin, Esquire
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

Michael F. Healy, Esquire
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

Allen R. Snyder
Elliot M. Mincberg
Hogan & Hartson
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

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Charles H. Cochran